No. 90-1500

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

HARVEY H. TODA,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent City and County of Honolulu believes that the question presented by Petitioner to the Court for review is whether the United States Court of Appeals for the Ninth Circuit erred in affirming the District Court's order granting Defendant's motion for summary judgment and dismissal of Plaintiff's complaint, based upon the doctrines of *res judicata* and collateral estoppel.

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CITY AND COUNTY OF HONOLULU,
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RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

CITATION OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

This action arises from:

Ninth Circuit No. 90-15483, judgment filed January 23, 1991

District Court (Hawaii) No. 89-00858, judgment filed March 2, 1990

Prior related actions:

Harvey H. Toda v. City and County of Honolulu

District Court (Hawaii) No. 86-1069, judgment filed October 8, 1987

Ninth Circuit No. 87-2820, judgment filed February 21, 1989

Writ of Certiorari denied October 2, 1989, 110 S. Ct. 89 (1989)

Harvey H. Toda v. Wayne K. Kaneko and City and County of Honolulu

District Court (Hawaii) No. 89-00087 DAE, judgment filed August 4, 1989

Ninth Circuit No. 89-16090, judgment filed January 25, 1991

COUNTERSTATEMENT OF THE CASE

This action arises out of the change in zoning of unimproved real property situated on Welelau Place, Aiea Heights, Hawaii. In November of 1942, the Respondent established an "AA" residential zoning for the subject property. In 1963, Petitioner and his wife purchased the property as tenants by the entirety. In 1969, Respondent rezoned the subject property to "R-3" residential by adoption of the Comprehensive Zoning Code of the City and County of Honolulu. In 1981, the property was down-designated "preservation" by Respondent's adoption of the Development Plan for the Primary Urban Center of the City and County of Honolulu. In 1982, by Respondent's adoption of Zoning Map No. 7, the subject property was down-zoned to "P-1" preservation, in accordance with its Development Plan designation. In 1985, one acre of the subject property was redesignated residential by amendment to the Development Plan for the Primary Urban Center. In 1986, the redesignated one acre of the subject property was rezoned "R-10" residential. The balance of the property retained a preservation designation and zoning.

Based upon these facts, Petitioner filed his first suit against Respondent in the United States District Court for the District of Hawaii entitled, *Toda v. City and County of Honolulu* and enumerated Civil No. 86-1069. This suit was disposed of by Order Granting Defendant's Motion for Summary Judgment

filed in the District Court on October 6, 1987. See Respondent's Appendix A. The United States Court of Appeals for the Ninth Circuit in Case No. 87-2820 affirmed the District Court's Order by memorandum decision filed in the Ninth Circuit on December 2, 1988. See Respondent's Appendix B. Petitioner filed a Petition for Writ of Certiorari to this Court, enumerated No. 88-2141, which was denied by order filed on October 2, 1989. 110 S. Ct. 89.

Subsequently, Petitioner filed a second suit in the United States District Court for the District of Hawaii based upon these same facts, and named as Defendants, Respondent and an employee of Respondent, in a case entitled, *Toda v. Kaneko* and enumerated Civil No. 89-00087 DAE. This suit was disposed of by Order Granting Defendant's Motion for Summary Judgment, which was filed in the District Court on August 2, 1989 and was based upon the doctrine of *res judicata*. See Respondent's Appendix C. The United States Court of Appeals for the Ninth Circuit in Case No. 89-16090 affirmed the District Court's Order by memorandum decision filed in the Ninth Circuit on August 7, 1990. See Respondent's Appendix D.

The within action arises from a third suit filed by Petitioner in the United States District Court for the District of Hawaii based upon these facts.

These facts were also relied upon by Petitioner in a real property tax appeal filed in the Tax Appeal Court of the State of Hawaii. The issues raised by Petitioner in his first United States District Court case, Civil No. 86-1069, were disposed of by Order Granting Appellee's (Respondent herein) Motion for Partial Summary Judgment filed in the Tax Appeal Court on February 25, 1988. The remaining issues were tried before the Court and judgment was entered by Findings of Fact, Conclusions of Law and Judgment filed on March 10, 1988. See Respondent's Appendix E. This Order was affirmed by the Supreme Court of the State of Hawaii by memorandum opinion filed on December 20, 1988. See Respondent's Appendix F.

SUMMARY OF ARGUMENT

There are no special or important reasons to warrant the exercise of the Court's discretionary jurisdiction in the within Petition. The lower court proceedings and the history of related

litigation based upon these facts support the District Court's dismissal of the Complaint upon the doctrine of *res judicata*.

ARGUMENT

Petitioner's Petition for Writ of Certiorari fails to set forth any special or important reasons to invoke the Court's exercise of its jurisdiction in this matter, and Respondent argues that such reasons do not exist. None of the considerations for review set forth in U.S. Supreme Court Rule 10, 28 U.S.C.A., have been identified by Petitioner as warranting the Court's exercise of its jurisdiction, and Respondent argues that none of said considerations apply herein. Specifically, the decision of the United States Court of Appeals for the Ninth Circuit is not a departure from the accepted and usual course of judicial proceedings, nor does it sanction such a departure by the District Court. In the United States District Court's Order Granting Defendant's Motion for Summary Judgment and Dismissal of Plaintiff's Complaint, filed on March 1, 1990, at page 2, the District Court, mindful of Petitioner's *pro se* status, recites that it made pointed inquiry of Petitioner to ascertain whether any new or different claims were presented in this suit which were not raised in prior proceedings, after the Court itself was unable to discern any substantial difference after the Court's careful review of Petitioner's pleadings. Petitioner was unable to show the Court how the within case differed from Petitioner's prior legal actions. Based upon these facts, Respondent argues that the District Court properly determined it was bound by the prior rulings of the Court and dismissed the Complaint. The Court of Appeals affirmed, citing for authority *Wright v. Montana-Dakota Utilities Co.*, 299 F.2d 470, 477 (9th Cir. 1962), *cert. denied*, 371 U.S. 962 (1963); *Hubicki v. AFC Industries*, 484 F.2d 519, 524 (3d Cir. 1973). *See also Montana v. United States, 440 U.S. 147, 153 (1979); Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897).

Significantly, this Court denied Petitioner's prior Petition for Writ of Certiorari in *Toda v. City and County of Honolulu*, at 110 S. Ct. 89 (1989), based upon these same facts and arising out of Petitioner's first lawsuit filed against Respondent in the United States District Court for the District of Hawaii.

CONCLUSION

The within Petition for Writ of Certiorari should be denied on the ground that no special or important reason exists for exercise of the Court's discretionary jurisdiction and further that none of the considerations set forth in Supreme Court Rule 10, 28 U.S.C.A., are applicable to the facts presented in this proceeding. The District Court properly ruled in dismissing the Complaint under the doctrine of *res judicata* following careful review of the pleadings filed by Petitioner and specific inquiry into the matter.

DATED: Honolulu, Hawaii, April 24, 1991.

Respectfully submitted,

RONALD B. MUN
Corporation Counsel
Counsel of Record
DIANE T. KAWAUCHI
Deputy Corporation Counsel
Attorneys for Respondent
City and County of Honolulu

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HARVEY H. TODA,	)	CIVIL NO. 86-1069
	)	
Plaintiff,	)	ORDER GRANTING
	)	DEFENDANT'S MOTION
vs.	)	FOR SUMMARY
	)	JUDGMENT
CITY AND COUNTY OF HONOLULU,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's Motions for Summary Judgment and Dismissal of the Complaint came before this Court for hearing on September 8, 1987. Diane T. Kawauchi, Deputy Corporation Counsel, City and County of Honolulu, appeared on behalf of Defendant, and Plaintiff appeared pro se. The Court having reviewed the motion and the memorandum and affidavits in support thereof, and memorandum in opposition thereto, having further reviewed the stipulations of the parties, having heard the arguments of the parties and being fully advised in the premises therein, finds and orders as follows:

Plaintiff is the owner of the subject real property located on Welelau Place, Aiea Heights, City and County of Honolulu, and identified as Tax Map Key Number 9-9-19-01. In November of 1942 Defendant established an "AA" residential zoning for the subject property. In 1969, Defendant's Comprehensive Zoning Code rezoned the subject parcel "R-3" residential. In 1981, Defendant adopted the Development Plan for the Primary Urban Center, which down-designated the parcel to "Preservation." In 1982, by Defendant's adoption of Zoning Map No. 7, the parcel was downzoned to "P-1" Preservation. In 1985

Defendant redesignated a one-acre portion of the subject property by amendment to the Development Plan for the Primary Urban Center to "Residential," and in 1986 said one-acre portion was rezoned "R-10" Residential by amendment to Zoning Map No. 7.

Plaintiff's Complaint alleges that Defendant's actions in down-designating and downzoning the subject property to preservation uses violated rights guaranteed to Plaintiff in the United States Constitution to just compensation, against infringement of contracts, and to due process of the laws. In addition, Plaintiff has alleged a conspiracy against Plaintiff in said actions of Defendant. The Court has reviewed the stipulations submitted by the parties as to facts and the withdrawal of claims and is unclear as to whether said stipulations dispose of all of the cause of actions alleged in the Complaint, and therefore the Court will address each issue separately herein.

I. Regulatory Taking

The United States Supreme Court has held in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and followed in *MacDonald, Sommer & Frate v. Yolo County*, 106 S. Ct. 2561 (1986), that regulatory taking claims are not ripe for adjudication in the federal court until the governmental entity charged with implementing the land use regulations has reached a final decision regarding the application of the regulations to the property at issue, and the Plaintiff has sought and been denied compensation in the state court. Under the decision in *Hamilton Bank*, a final and authoritative determination requires not only that Plaintiff has submitted a development plan for the property which was rejected, but also that Plaintiff sought variances or waivers which would permit uses not allowed under the regulations.

In support of its argument that Plaintiff's regulatory taking claim is not ripe for adjudication, Defendant has submitted the Affidavit of Loretta Chee who is employed in the Defendant's Department of Land Utilization and who testifies that the records of the applications for variance of zoning provisions maintained by said Department do not include any application submitted by Plaintiff for the subject property at any time

after the effective date of Zoning Map No. 7 on December 23, 1982, which downzoned the subject parcel to "P-1" Preservation. The Plaintiff has submitted no evidence to contradict the Affidavit of said Loretta Chee nor has Plaintiff submitted any other evidence to rebut Defendant's contention that this claim is not ripe for adjudication and, accordingly, the Court rules that summary judgment is warranted on Plaintiff's claim of a regulatory taking following the decisions in *Hamilton Bank* and *Yolo County*.

II. Infringement of Contractual Rights

The Court finds no infringement of any contractual right by Defendant's action in downzoning the subject property. Plaintiff based this claim of constitutional violation in part on the following language of Section 46-4(a), Hawaii Revised Statutes ("HRS"):

> Nothing in this section shall invalidate any zoning ordinance or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

The Court rules, as a matter of law, that Section 46-4(a), HRS, affords Plaintiff no contractual rights to the continued residential zoning of the subject parcel.

Plaintiff also alleged that the deed to the property constituted a contract with Defendant which afforded Plaintiff the right to continued residential zoning. On this point the Court concludes that even if a contractual relation did exist between parties, the Contract Clause of Article 1 of the U.S. Constitution does not operate as an absolute prohibition but rather guards against impairment of contractual obligations only when such infringement is substantial. Zoning and land use regulations are the most fundamental of police powers of the state and are suspect only when exercised with abuse of discretion. However, where the property owner has been damaged by illegal zoning or land use regulations, the property owner is entitled to compensation in the state and not the federal court. The Court notes that punitive damages are not recoverable against Defendant.

As the Court finds the absence of any material disputed fact, the Court concludes that summary judgment is warranted and grants Defendant's motion on the claim of infringement of contractual rights.

III. Procedural Due Process

Plaintiff claims that he is entitled to personal notice of Defendant's action in downzoning the subject property by virtue of Defendant's Ordinance No. 84-111 and the Fourteenth Amendment of the U.S. Constitution. The Court notes that the parties have stipulated to the withdrawal of Plaintiff's claim based upon the alleged violation of Defendant's Ordinance No. 84-111, and it is clear to the Court that said ordinance is inapplicable herein, it having taken effect after the adoption of the ordinance downzoning Plaintiff's property.

With regard to the right to procedural due process guaranteed in the U.S. Constitution, the Supreme Court has recognized the distinction to be made between legislative and administrative actions of government and the notice requirements attendant thereto as mandated by the Constitution. *Bi-Metallic Investment Co. v. State Board of equalization*, 239 U.S. 441 (1915). Where the action is legislative, personal notice is not required by the Constitution, and the 9th Circuit has held that as a matter of law the enactment of a general zoning ordinance, such as Defendant's Zoning Map No. 7, is a legislative act. *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982). The Court notes that the parties have stipulated that notice by publication was provided for Defendant's adoption of Ordinance No. 81-79, which enacted the Development Plan for the Primary Urban Center, and Ordinance No. 82-62, which enacted Zoning Map No. 7. Accordingly, the Court finds that summary judgment in Defendant's favor is warranted on the issue of procedural due process.

IV. Conspiracy

Plaintiff alleges that the subject property was downzoned for the benefit of subsequent acquisition by Defendant for a sewer facility. In support of its motion for summary judgment, Defendant offered the Affidavit of Raymond Yamashita of the Defendant's Department of General Planning, who testifies that he recommended redesignation of the subject property to

"Preservation" in the process of preparing the Development Plan for the Primary Urban Center and that his recommendation was not due to any knowledge of a planned sewer facility for Plaintiff's property. Defendant also offered the Affidavit of James Honke of the Defendant's Department of Public Works, Division of Wastewater Management, who testifies that said Division is charged with the function, among other things, of designing and site selection for wastewater facilities. Mr. Honke testifies that he has reviewed the records of said Division, and Plaintiff's property was not designated as the site for a pump station for the period 1979 through 1986 in any of said records.

The Court finds an absence of an issue of fact and accordingly finds it appropriate to grant Defendant's motion for summary judgment on the issue of conspiracy.

V. Conclusion

All issues in Plaintiff's Complaint, having been addressed in Defendant's motion for dismissal and for summary judgment, and the Court having found good cause to grant summary judgment in Defendant's favor on the issues of regulatory taking, contractual obligations, procedural due process and conspiracy, this order hereby concludes this matter.

DATED: Honolulu, Hawaii, October 6, 1987.

/s/ Harold M. Fong

UNITED STATES DISTRICT JUDGE

CIVIL NO. 86-1069
TODA v. CITY AND COUNTY OF HONOLULU
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEY H. TODA,	CIVIL NO. 87-2820
Plaintiff-Appellant,	DC NO. CV-86-1069-HMF
vs.	
CITY AND COUNTY OF HONOLULU,	MEMORANDUM*
Defendant-Appellee.	

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Submitted November 16, 1988**
Honolulu, Hawaii

Before: CHOY, O'SCANNLAIN, and TROTT, Circuit Judges

Harvey H. Toda appeals the district court's summary judgment for the City and County of Honolulu ("Honolulu") on the issues of regulatory taking, procedural due process, infringement of contractual rights, and conspiracy. We affirm.

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* *This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.*

** *The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit Rule 34-4.*

FACTS AND PROCEEDINGS

This action arises out of the change in zoning of real property identified as Tax Map key Number 9-9-19-01 situated on Welelau Place, Aiea Heights, State of Hawaii. In November of 1942, Honolulu established an "AA" residential zoning for the subject property. In 1963, Toda and his wife purchased the real property as tenants by the entirety. In 1969, Honolulu rezoned the subject parcel to "R-3" residential pursuant to a Comprehensive Zoning Code. In 1981, Honolulu adopted a development plan for the Primary Urban Center which down-designated the parcel to "Preservation." In 1982, the parcel was down-zoned to "P-1" preservation by Honolulu's adoption of Zoning Map No. 7. In 1985, one acre of the subject property was redesignated "Residential" by amendment of the development plan for the Primary Urban Center. In 1986, that one acre portion was rezoned "R-10" Residential by amendment to Zoning Map No. 7.

Toda filed a claim in the district court alleging that Honolulu had violated his constitutional rights: (1) against infringement of contracts; (2) to due process of law; and (3) to just compensation. Each of these claims had various sub-allegations.

At a hearing before Judge Fong, on Honolulu's motion for summary judgment, Toda appeared to withdraw several of his complaints, and the remaining claims were dealt with by way of summary judgment. The order was filed and summary judgment granted to Honolulu on the issues of regulatory taking, infringement of contractual rights, procedural due process, and conspiracy. Toda filed an appeal before the order was filed, but after the hearing, thus, pursuant to Fed. R. App. P. 4(a)(1) and (2), the notice is timely.

DISCUSSION

1. *Standard of Review*

A district court's entry of summary judgment is reviewed *de novo. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir. 1987).

2. *Appellant's Constitutional Claims*

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, when a motion for summary judgment is made and supported as provided by the rules, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Toda here did not set forth any genuine issue of material facts, thus leaving none in dispute. The district court applied the applicable law to the undisputed facts.

A. *Regulatory Taking*

The Supreme Court held in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that a just compensation claim based upon a regulatory taking is not ripe for review by the federal court until the concerned party has: (1) sought and received a final decision by the proper governmental authority responsible for implementing the regulation, *id.* at 186; and (2) sought and been denied compensation through state procedures. *Id.* at 195. Such adjudications allow factfinding for which the state agency is particularly qualified, and ensures that the claim is ripe for review. *Id.*; *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453-54 (9th Cir. 1987), *amended*, 830 F.2d 968 (1987), *cert. denied*, 108 S. Ct. 775 (1988). Toda has never claimed that a development plan of his was rejected by the authorities. Therefore, under *Hamilton Bank*, this case cannot be considered ripe for review. The district court properly granted summary judgment to the City and County of Honolulu on this matter.

B. *Procedural Due Process*

Toda claims that he was denied procedural due process because Honolulu did not inform him of its zoning changes. This circuit has ruled that the enactment of a general zoning ordinance is a legislative act, *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982), which does not require procedural due process to anyone affected by it.

Texaco v. Short, 454 U.S. 516, 531-38 (1982); *O'Neill v. Town of Nantucket*, 711 F.2d 469, 471 (1st Cir. 1983). Therefore, the district court properly found that the zoning ordinances about which Toda complains need not have been preceded by notice to the landowners concerning their implementation.

C. *Infringement of Contractual Rights*

Toda also argues that his purchase of the property and his payment of property taxes vested in him the right to retain the property, zoned as it was when he first purchased it. The zoning regulations established on Toda's property do not constitute a contract between Honolulu and Toda. Therefore, the zoning remained subject to modification. *See generally Texaco*, 454 U.S. at 532-33.

Therefore, the district court was correct when it held that no constitutional violation of contract had occurred as a result of Honolulu's zoning regulations.

3. *Conspiracy Charges*

Toda contends that Honolulu conspired to downzone his property so that it could later acquire his property at a reduced value for its use as a sewage facility. Honolulu submitted the affidavits of personnel in charge of sewage station development, Yamashita and Honke, stating that they had no knowledge that Honolulu planned on using Toda's property as a sewage pump station. According to Fed. R. Civ. P. 56(e), Toda was required to set forth specific facts in light of these affidavits. His failure to do so allowed summary judgment on this issue.

4. *Ex Post Facto*

Finally, Toda presents a new argument on appeal that the zoning laws violated the Constitution in that they were *ex post facto*. Even if this court were to hear the claim at this time, it could not grant Toda any relief on this ground. *Ex post facto* laws only prohibit the application of new punitive measures to a consummated crime. *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). This court is not presented with an *ex post facto* claim involving a crime.

CONCLUSION

The district court appears to have dealt with all of the issues before it. Given the multifaceted nature of Toda's allegations, the district court did an admirable job of sifting his contentions so as to separate out and dispose of the above arguments.

We uphold the district court's summary judgment dismissal of all of Toda's claims.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HARVEY H. TODA, PRO SE,	CIVIL NO. 89-00087 DAE
Plaintiff,	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
vs.	
WAYNE K. KANEKO and CITY AND COUNTY OF HONOLULU,	
Defendants.	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment and for Dismissal of Complaint came before this court for hearing on July 17, 1989. Maria C. Avinante-Tanaka, Deputy Corporation Counsel, City and County of Honolulu, appeared on behalf of Defendants, and Plaintiff appeared pro se. The court having reviewed the motion and the memorandum and affidavits in support thereof, and memorandum in opposition thereto, having heard the arguments of the parties and being fully advised in the premises therein, finds and orders as follows:

Plaintiff is the owner of the subject real property located on Welelau Place, Aiea Heights, City and County of Honolulu, and identified as Tax Map Key Number 9-9-19-01. In November of 1942, Defendant City established an "AA" residential zoning for the subject property. In 1969, Defendant City's Comprehensive Zoning Code rezoned the subject parcel "R-3" residential. In 1981, Defendant City adopted the Development Plan for the Primary Urban Center, which down-designated the parcel to "Preservation." In 1982, by Defendant City's

adoption of Zoning Map No. 7, the parcel was downzoned to "P-1" Preservation. In 1985, Defendant City redesignated a one-acre portion of the subject property by amendment to the Development Plan for the Primary Urban Center to "Residential," and in 1986, said one-acre portion was rezoned "R-10" Residential by amendment to Zoning Map No. 7.

Plaintiff's Complaint alleges that Defendant City's actions in down-designating and downzoning the subject property to preservation uses violated rights guaranteed to Plaintiff in the United States Constitution to just compensation, against infringement of contracts, and to due process of the laws. In addition, Plaintiff has alleged a conspiracy against Plaintiff in said actions of Defendants.

Based on the same set of facts as discussed above, the Plaintiff pro se filed his first suit on November 21, 1986 against the City and County of Honolulu in the United States District Court of Hawaii entitled, *Harvey H. Toda v. City and County of Honolulu* and enumerated Civil No. 86-1069. The same issues were presented in that case which were presented in Plaintiff's present Complaint. The suit alleged constitutional violations of 1) regulatory taking, 2) infringement of contractual rights, 3) just compensation, and 4) procedural due process and additionally an allegation of conspiracy. Each of these claims had various sub-allegations. The court entered summary judgment in favor of Appellee City and County of Honolulu by Order filed therein on October 6, 1987. On January 18, 1988, Defendant City appealed the Order Granting Appellee's Motion for Summary Judgment to the United States Court of Appeals for the Ninth Circuit and added a new argument on appeal, which was that the zoning laws violated the Constitution in that they were *ex post facto*. On December 2, 1988, the Ninth Circuit upheld the district court's summary judgment dismissal of all of Mr. Toda's claims and also held that the court was not presented with an *ex post facto* claim involving a crime. Mr. Toda is currently pursuing a writ of certiorari to the United States Supreme Court appealing the Ninth Circuit Court's decision.

At approximately the same time the federal district court case was proceeding, the Plaintiff also filed a State tax appeal complaint on April 4, 1987 entitled, *In the Matter of the Tax Appeal of Harvey H. Toda*, Case No. 2485. In addition to the

valuation issue regarding Mr. Toda's property for the 1987-88 tax year, again the exact same issues were once again argued by Plaintiff, which were constitutional violations based on regulatory taking, infringement of contractual rights, procedural due process and conspiracy. On February 25, 1988, the State tax court granted Appellee's Motion for Partial Summary Judgment. On April 25, 1988, Mr. Toda appealed the Findings of Fact and the granting of Appellee's Motion for Partial Summary Judgment to the Supreme Court of the State of Hawaii, enumerated No. 12975. On December 20, 1988, the Supreme Court affirmed the lower court's decision with respect to the granting of the Partial Summary Judgment, and on January 25, 1989, the Hawaii Supreme Court entered its entry of judgment on appeal, affirming the Findings of Fact, Conclusions of Law and Judgment of the Tax Appeal Court entered on March 10, 1988.

This case involves the same facts, cause of action and parties involved in Plaintiff's 1986 United States District Court case, Civil No. 86-1069, and the 1987 State tax case entitled, *In the Matter of the Tax Appeal of Harvey H. Toda*, Case No. 2485. The only difference is that in this case, Plaintiff has also named Wayne K. Kaneko as an additional Defendant. Mr. Kaneko was employed as a real property tax assessor for the City and County and was acting in an official capacity for the City and County of Honolulu.

The doctrines of *res judicata* and collateral estoppel have been developed in order to protect adversaries from the expense of wasteful and vexatious lawsuits and to conserve judicial resources by denying parties a second chance to litigate an issue they have already had one opportunity to litigate. *Montana v. United States*, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 217 (1979).

In *Tait v. Western Maryland R. Co.*, 289 U.S. 620, 624, 77 L.Ed. 1405, 53 S.Ct. 706, and *Commissioner v. Sumner*, 333 U.S. 591, 92 L.Ed. 898, 68 S.Ct. 715 (1933), the court, in finding that the factual and legal context in which the issues of a case had not materially changed since a prior similar case, held that the normal rules of preclusion should operate to relieve the parties of "redundant litigation [over] the identical question of the statute's application to the taxpayer's status."

The court having reviewed the issues in Plaintiff's Complaint, having been addressed in Defendants' motion for dismissal and for summary judgment, and the court having found no genuine issues of material fact in this case finding in Defendants' favor, based upon the doctrine of *res judicata*, this order hereby concludes this matter.

DATED: Honolulu, Hawaii, August 2, 1989.

/s/ DAVID A. EZRA

Judge of the above-entitled Court

CIVIL NO. 89-00087 DAE - HARVEY H. TODA, PRO SE v. WAYNE K. KANEKO and CITY AND COUNTY OF HONOLULU - ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEY H. TODA,	)	No. 89-16090
	)	
Plaintiff-Appellant,	)	DC NO. CV-89-0087-DAE
	)	
vs.	)	
	)	
WAYNE K. KANEKO and CITY AND COUNTY OF HONOLULU,	)	MEMORANDUM*
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding
Submitted August 3, 1990**

Before: WALLACE, CANBY and RYMER, Circuit Judges

Harvey H. Toda appeals pro se from the district court's entry of summary judgment against him on the basis of res judicata. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

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* *This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit R. 36-3.*

** *The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.*

Toda's present suit is nothing more than a rehash of his prior suit in *Toda v. City and County of Honolulu*, No. 87-2820, memorandum disposition (9th Cir. Nov. 16, 1988), *cert. denied*, 110 S. Ct. 89 (1989). Like the instant case, *Toda* involved the rezoning of Toda's real property in the City and County of Honolulu. *Id.* Because the matters raised in the instant suit were raised or could have been raised in Toda's prior suit, Toda is barred by the doctrine of res judicata from raising them again. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *American Triticale, Inc. v. Nytco Services, Inc.*, 664 F.2d 1136, 1146-47 (9th Cir. 1981). The district court therefore did not err by granting summary judgment to the appellees based on res judicata.

AFFIRMED.

APPENDIX E

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IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal of HARVEY H. TODA, Appellant.	CASE NO. 2485 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter came before the Court for trial on January 29, 1988. Present were Appellant pro se, HARVEY H. TODA, and Appellee CITY AND COUNTY OF HONOLULU, represented by DIANE T. KAWAUCHI, Deputy Corporation Counsel. Following hearing and upon consideration of the arguments of the parties, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is a real property tax appeal contesting the valuation of vacant real property owned by the Appellant and identified as Tax Map Key Number 9-9-19-01.

2. The subject property is situated on Welelau Place, Aiea Heights, City and County of Honolulu, and has an area of 203,844 square feet.

3. The appeal involves tax year 1987-88 and the real property tax assessment determined by Appellee of $213,664 as of January 1, 1987.

4. The property is subject to two zoning designations, being a residential "R-10" zone and a preservation "P-2" zone. The residentially zoned portion is one acre in size, is in the approximate shape of a square, is level and is situated along the boundary where Welelau Place meets the subject parcel. The balance of the lot, or approximately 3.6796 acres which is zoned preservation, is steeply sloped.

5. The parcel is subject to a ten-foot wide water pipeline easement of total area 2,602 square feet. The easement is situated along the boundary of the parcel which meets Welelau Place and extends through both the residential and preservation zoned portions of the parcel, apportioned as follows: 900 square feet in the residentially zoned area and 1,702 square feet (approximately .0391 acre) in the preservation zone.

6. The subject parcel is situated in an area which is not serviced by a public sewer system.

7. The subject parcel is situated in an area which is regulated by the Board of Water Supply as to certain waste disposal facilities, to ensure that the domestic water supply is not adversely affected by the presence of such facilities. Said Board of Water Supply regulation will not permit the installation of a cesspool for a new dwelling in the area of the subject parcel.

8. The assessment determined by the Appellee for the subject tax year failed to consider the encumbrance of the water pipeline easement upon the property and failed also to consider the effect of the Board of Water Supply regulation upon the residential development of the property.

9. A fair and reasonable discount for the area encumbered by the easement is 15 percent and is utilized uniformly by Appellee for water pipeline easements in the valuation of property for real property tax purposes.

10. The minimum lot size for "R-10" residentially zoned property is 10,000 square feet.

11. The fair market value of "R-10" residentially zoned property in the neighborhood of the subject property is $7.40 per square foot as determined by comparable sales.

12. The fair market value of the residentially zoned portion of the subject property is determined by applying the $7.40 per square foot value to the first 10,000 square feet of the area, and 25 percent of said $7.40 or $1.85 to the balance of the one acre or 33,560 square feet.

13. The value of the preservation zoned land was determined by studies conducted by Appellee for the county and establishes a fair market value of $6,000 per acre.

14. Appellee presented the testimony of Wayne Kaneko, real property tax appraiser, Department of Finance, City and County of Honolulu, who stated that in his opinion, based upon information obtained from the Board of Water Supply regarding the limitations on the installation of certain waste disposal facilities for the subject property, a discount of 50 percent would be appropriate for the residentially zoned area of the subject parcel by reason of the current restrictions on the development thereof.

15. Appellant presented no comparable sales to support the property value alleged by Appellant in this appeal. Appellant offered his own testimony as to the fair market value

of the parcel. Appellant offered no evidence that he has received any training in real property appraising.

16. Appellant offered evidence of the assessed value and method of valuation of the subject parcel for real property tax purposes for the 1967-68 tax year, in support of Appellant's alleged value of the parcel for the 1987-88 tax year. For the 1967-68 tax year, the entire parcel was residentially zoned. The Court had no evidence of the effect of the 20-year lapse of time on the value of the property.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this appeal.

2. The value of the subject real property as of the assessment date for the subject tax year must consider the land use restrictions existing on said land as of the January 1, 1987 assessment date.

3. The tax assessed value of the subject parcel in 1967 and the method applied to determine said value are not relevant to the determination of the fair market value as of January 1, 1987, where the facts show that the zoning for the parcel has changed since 1967 and there was no evidence to support a finding that property values have remained static.

4. In this real property tax appeal, the value of the subject property as determined by Appellee is deemed prima facie correct. Hawaii Revised Statutes Section 232-13, incorporated by Revised Ordinances of Honolulu 1978, as amended, Section 8-12.8. The burden of going forward and proving fair market value rests with Appellant.

5. The Court has previously ruled on Appellee's Motion for Partial Summary Judgment having determined that there was no genuine issue of any material fact, and Appellee was entitled to judgment as a matter of law as to the following issues raised in the appeal herein:

(1) the alleged violation of Appellant's constitutional right to just compensation upon a regulatory taking;

(2) the alleged violation of Appellant's constitutional right to procedural due process of the laws;

(3) the alleged violation of Appellant's constitutional right against infringement of contractual rights;

(4) the absence of the Court's subject matter jurisdiction as to the appeal for tax year 1983-84; and

(5) the alleged conspiracy against Appellant to down-designate and downzone the subject property.

5. There was error in the Appellee's failure to consider the water pipeline easement and the Board of Water Supply regulation in determining the assessed valuation of the subject parcel for the 1987-88 tax year.

6. The fair market value of the subject real property established by a preponderance of the evidence is $89,586 as of January 1, 1987 for the 1987-88 tax year.

JUDGMENT

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be, and is hereby entered in Appellant's favor, reducing the value of the real property identified as Tax Map Key No. 9-9-19-01 to $89,586 for tax year

1987-88 as established by a preponderance of the evidence to be the fair market value of the property.

DATED: Honolulu, Hawaii, March 10, 1988.

/s/ Robert G. Klein (SEAL)

Judge of the above-entitled Court

APPROVED AS TO FORM:

HARVEY H. TODA
1363 Hoowali Street
Pearl City, Hawaii 96782

APPENDIX F

NO. 12975

IN THE SUPREME COURT OF THE
STATE OF HAWAII

In the matter of the Tax Appeal of HARVEY H. TODA, Taxpayer-Appellant.	TAX APPEAL CASE NO. 2485 APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT FILED ON MARCH 10, 1988 TAX APPEAL COURT HONORABLE ROBERT G. KLEIN Judge

MEMORANDUM OPINION

This is a pro se appeal by a taxpayer from a judgment in his favor in the tax appeal court. Appellant's brief and points of error do not cite or quote the findings of fact and conclusions of law entered by the tax appeal court. Appellant's contentions with respect to the partial summary judgment which was entered against him appear to be a claim for what is in effect an inverse condemnation. Such a claim is beyond the jurisdiction of the tax appeal court and is already the subject of a United States District Court action. We find no merit to any of appellant's contentions. Affirmed.

DATED: Honolulu, Hawaii, December 20, 1988.

Harvey H. Toda
on the brief,
appellant pro se

Diane T. Kawauchi,
Deputy Corporation
Counsel, on the brief
for appellee City

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank Padgett
/s/ Yoshimi Hayashi
/s/ James Wakatsuki